CASE NO. 19-CI-01063

JEFFERSON CIRCUIT COURT
DIVISION TEN
JUDGE ANGELA McCORMICK BISIG
ELECTRONICALLY FILED

JOHN P. ASKIN — PLAINTIFF

v. **UNIVERSITY OF NOTRE DAME'S MOTION TO DISMISS**

UNIVERSITY OF NOTRE DAME, DU LAC and NATIONAL COLLEGIATE ATHLETIC ASSOCIATION — DEFENDANTS

* * * * *

Defendant University of Notre Dame du Lac ("Notre Dame") moves under CR 12.02 to dismiss all claims asserted against it. As detailed in the accompanying memorandum of law, plaintiff John P. Askin's claims are barred by the statute of limitations and statute of repose.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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MEMORANDUM OF LAW IN SUPPORT OF UNIVERSITY OF NOTRE DAME'S MOTION TO DISMISS

UNIVERSITY OF NOTRE DAME, DU LAC and NATIONAL COLLEGIATE ATHLETIC ASSOCIATION — DEFENDANTS

* * * * *

INTRODUCTION

In 1982, John Askin arrived at the University of Notre Dame to pursue an academic degree and to play college football. Askin claims that, over the next five years, he sustained at least four concussions and many more head injuries while participating in football games and practices. Now, more than thirty years after he last wore a Notre Dame uniform, Askin has filed this lawsuit seeking to recover damages for the effects of these injuries. Each of his claims is untimely and must be dismissed.

Askin's negligence claim is based on the fundamentally flawed premise that, because he allegedly was not diagnosed with brain disease until 2018, the claim is timely under the one-year statute of limitations. This is not the law in Kentucky. Rather, the one-year statute of limitations begins to run at the time a plaintiff suffers an *injury*, not when a plaintiff learns of the *extent of the harm* emanating from that injury years (or decades) later. Here, the Complaint's allegations make clear that Askin sustained head injuries between 1982 and 1986 and that he was fully aware that Notre Dame (allegedly) caused those injuries. Because Askin filed his negligence claim well beyond the one-year statute of limitations, the claim is time barred.

The "discovery rule," which tolls statutes of limitations in certain circumstances enumerated by the Kentucky General Assembly, does not apply to Askin's claim. The General Assembly has not extended the rule to personal injury claims, and Kentucky's appellate courts have refused to expand the discovery rule beyond its statutory bounds. The only judicially created application of the discovery rule—to latent disease caused by exposure to toxic chemicals—is inapplicable to Askin's claim. No Kentucky court has ever sanctioned application of the discovery rule where the plaintiff suffered an injury at the time of the alleged tortious conduct and knew who caused that injury.

Even if the discovery rule did apply, Askin's negligence claim would still be untimely because he had both actual and constructive knowledge of his injuries long ago as a matter of law. The Complaint devotes seven pages to a chronology detailing a century's worth of medical literature, studies, and other publications linking football to brain injuries, contending that these publicly available sources were known by Notre Dame and gave rise to a duty to warn student-athletes. But in the same breath, the Complaint disclaims that Askin had any knowledge of these publications—either during his playing days or in the many years since—and pleads that he was unaware of the connection between football and brain injuries until 2018. No amount of artful pleading, however, can avoid the conclusion that these sources put Askin on notice of his potential claims well more than one year before he filed the Complaint.

Askin's fraud claims fare no better: they too are barred as untimely. Kentucky's statute of repose requires fraud claims to be asserted within ten years after the perpetration of the alleged fraud. The Complaint alleges that fraudulent acts were perpetrated between 1982 and 1986, when Notre Dame allegedly failed to inform Askin of the long-term risks associated with

playing football. Because the Complaint was filed in 2019, Askin's fraudulent concealment and constructive fraud claims are well outside the ten-year period.

Finally, Askin's purported claim for "punitive damages" fails because it is not an independent cause action but, rather, a remedy potentially available for another cause of action. Given that Askin's underlying tort claims are untimely, his claim for punitive damages also must be dismissed.

In the end, Askin's claims come far too late. This Court should dismiss the Complaint with prejudice as barred by Kentucky's statute of limitations and statute of repose.

BACKGROUND

I. Askin's football career and alleged injuries.[1]

Askin played college football at Notre Dame more than thirty years ago, for a five-year period from 1982 to 1986. (Compl. ¶ 50.) Before his days at Notre Dame, Askin played football in junior high and for four years at Archbishop Moeller High School in Cincinnati. (*Id.* ¶¶ 48-49.) Following his final collegiate season, Askin participated in training camps for two NFL teams, the New England Patriots and Cleveland Browns, before suffering a career-ending knee injury in 1987. (*Id.* ¶¶ 149-150.) In total, Askin's football career spanned more than a decade.

The Complaint alleges that Askin sustained the following mild traumatic brain injuries ("MTBI") between 1982 and 1986 during his collegiate career at Notre Dame:

- "John Askin sustained four concussions as a player at Notre Dame that were recorded by Notre Dame . . . ." (*Id.* ¶ 80);
- "John Askin . . . sustained many more concussive and sub-concussive injuries while [he] played football on the Notre Dame team, but never recognized them at the time . . . ." (*Id.* ¶ 82).

[1] For purposes of this motion to dismiss, Askin's factual allegations are accepted as true for the sake of argument. *See Carruthers v. Edwards*, 395 S.W.3d 488, 491 (Ky. App. 2012). By making this motion, Notre Dame does not concede the accuracy of any of the Complaint's allegations.

Askin contends that these injuries were caused by the misconduct of Notre Dame coaches and trainers who allegedly (i) "encouraged tackling and/or playing methods that . . . caused MTBI to Notre Dame football players in practices and games" (*id*. ¶ 47); (ii) "ordered and expected" injured players to "continue to participate in the practice or game" after sustaining head injuries (*id*. ¶ 76); and (iii) dispensed certain drugs that rendered him "unable to recognize pain and/or a concussive event on the field" (*id*. ¶ 98).

As a result of this alleged misconduct and "repetitive head impacts" that he allegedly sustained at Notre Dame from 1982 to 1986—including "four concussions" and "many more concussive and sub-concussive injuries"—Askin contends he was placed "at an increased risk for developing" and "now suffers from . . . symptoms of latent neurodegenerative brain disease caused by football." (*Id*. ¶¶ 20, 67.) Askin alleges such symptoms include "varying forms of neuro-cognitive disability, decline, personality change, [and] forgetfulness" (*id*. ¶ 175), but he does not allege when these symptoms first began. Instead, the Complaint alleges that (i) as of 2005 (when Askin and his employer determined he was permanently disabled), "[t]here was no evidence . . . that John Askin had suffered any mental malfunction or latent brain damage" (*id*. ¶ 152), and (ii) on February 15, 2018, Askin allegedly was diagnosed with "neurodegenerative disease that is most likely CTE" (*id*. ¶ 154). The Complaint is devoid of any allegations, however, about the thirteen-year gap between his 2005 disability determination—when he claims there was "no evidence" of his symptoms—and his 2018 diagnosis.

II. The studies identified in the Complaint connect football and Askin's injuries.

Over the span of about seven pages, the Complaint cites numerous articles, studies, and publicly available information that purport to link participation in football, head injuries, and the symptoms of those injuries experienced by Askin. (*See id*. ¶¶ 102-135.) According to the Complaint, since at least the 1920s, "medical science has long recognized the debilitating effects

of concussions and other MTBI, and found that repetitive head impacts can cause permanent brain damage . . . ." (*Id.* ¶ 103.) Askin alleges that "[t]he published medical literature . . . contains studies of athletes dating back as far as 1928 and demonstrates a scientifically-observed link between repetitive blows to the head and latent neurodegenerative brain disease." (*Id.* ¶ 13.)

For instance, the Complaint details, among other publicly available information, the following sources that allegedly connect football and brain injuries:

- 1933 NCAA medical manual that allegedly "acknowledged the risks of long-term brain disease in football players" (*id.* ¶ 105);
- 1937 American Football Coaches Association report allegedly "warning that players who suffer a concussion should be removed" from contact sports (*id.* ¶ 106);
- 1952 New England Journal of Medicine article allegedly "recommending that players cease to play football permanently after receiving their third concussion" (*id.* ¶ 110);
- 1973 book entitled "Head and Neck Injuries in Football" (as well as an earlier 1969 study) allegedly recommending that "any concussive event with transitory loss of consciousness requires the removal of the football player from play" (*id.* ¶ 115);
- 1982 studies conducted by the University of Virginia and other institutions on college football teams allegedly showing that "football players who suffered MTBI suffered pathological short-term and long-term damage" (*id.* ¶¶ 123-124);
- 1986 American College of Sports Medicine publication containing "Concussion Grading Guidelines" (*id.* ¶ 125);
- 1999 National Center for Catastrophic Sport Injury Research study involving 18,000 collegiate and high school football players allegedly showing that "once a player suffered one concussion, he was three times more likely to sustain a second in the same season" (*id.* ¶ 127);
- 2005-2007 Center for the Study of Retired Athletes survey allegedly finding "a strong correlation between depression, dementia, and other cognitive impairment in professional football players and the number of concussions those players had received" (*id.* ¶ 130); and
- 2010 NCAA legislation requiring all member institutions to have a concussion management plan in place that mandates the removal of players exhibiting concussion symptoms from practice or competition and prohibits players diagnosed with a concussion from returning to activity for the remainder of the day (*id.* ¶¶ 143-145).

Despite this plethora of publicly available information, Askin alleges that "[a]t no time while he was a player at Notre Dame *or until he was diagnosed in 2018* did [he] ever know or suspect that he had been exposed to an increased risk of long-term latent neurodegenerative brain disease and the insidious and latent disease known as CTE." (*Id.* ¶ 69); *see also* (*id.* ¶ 176) ("*At no time prior to being diagnosed* [in 2018] was John Askin ever aware that he had been exposed at Notre Dame to an elevated risk of latent long-term neurodegenerative brain disease at Notre Dame.") (emphases added).

III. Askin's claims against Notre Dame.

Askin asserts four causes of action against Notre Dame: negligence (Count I); fraudulent concealment (Count II); constructive fraud (Count III); and punitive damages (Count IV). With respect to the negligence claim, Askin alleges that Notre Dame owed him a duty to protect his health and safety but breached that duty by (i) "failing to disclose and/or failing to recognize and/or being willfully blind to material information regarding the long-term risks of latent brain disease that arise from repetitive mild brain trauma in football" (*id.* ¶ 161); (ii) "actively and intentionally teaching Notre Dame football players to use their helmeted head when tackling and blocking" (*id.* ¶164); and (iii) "administering to him . . . medication . . . to inure him to pain during practices and games" (*id.* ¶ 169).

Askin's fraudulent concealment and constructive fraud claims are based on near-identical allegations that "[a]s early as 1933, and certainly between 1982-86 . . . Notre Dame knew that repetitive head impacts in football games and full-contact practices created a substantial risk of latent brain disease to student-athletes . . . ." (*Id.* ¶¶ 181, 192.) The claims allege that "[d]espite this knowledge and awareness Notre Dame . . . failed to inform football players, including John Askin, of these risks with the intent of misleading them . . . ." (*Id.* ¶¶ 183, 194.)

Last, Askin seeks punitive damages against Notre Dame because the university allegedly "acted with oppression against John Askin and fraudulently failed to take action that would prevent the latent brain disease from which he now suffers." (*Id.* ¶ 207.)

ARGUMENT

I. Legal standard.

Statute of limitations may be raised as a defense on a motion to dismiss "if the complaint on its face shows that the action is barred by time." *Boone v. Gonzalez*, 550 S.W.2d 571, 573 (Ky. App. 1977); *see also Tomlinson v. Siehl*, 459 S.W.2d 166, 167 (Ky. 1970) ("[W]here the complaint shows upon its face that it is barred by limitation[,] the question may be reached by motion to dismiss." (internal citation omitted)). "[W]here the pertinent facts are not in dispute, the validity of the defense of the statute of limitations can and should be determined by the court as a matter of law." *Victory Cmty. Bank v. Socol*, 524 S.W.3d 24, 29 (Ky. App. 2017), *reh'g denied* (Mar. 1, 2017), *review denied* (Aug. 16, 2017) (quoting *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 572–73 (Ky. 2009) (internal citations omitted)). If the conduct challenged by a complaint is brought after the standard limitation period, a plaintiff "must anticipate the defense of a statute of limitation" and allege "facts necessary to overcome the defense." *Lunsford v. Elfers*, 756 S.W.2d 146, 147 (Ky. App. 1988) (dismissing claim on statute of limitations grounds).

The Kentucky Supreme Court has endorsed the U.S. Supreme Court's *Iqbal* "facial plausibility" standard for assessing the sufficiency of allegations in a Complaint, as well as *Twombly*'s holding that mere "labels and conclusions" do not represent sufficient pleading. *See McDaniel v. Commonwealth*, 495 S.W.3d 115, 121 n.6 (Ky. 2016) (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). Accordingly, a

pleading that offers a "formulaic recitation of the elements of a cause of action" will not survive a motion to dismiss. *Twombly*, 550 U.S. at 555.

II. Kentucky's statutes of limitations and repose apply to Askin's claims.

Askin's negligence claim (Count I), which is based on personal injuries he allegedly sustained while playing football at Notre Dame in Indiana, is governed by Kentucky's one-year statute of limitations. KRS 413.140(1)(a). Askin's fraud claims (Counts II and III), which are based on Notre Dame's alleged failure to disclose information to Askin from 1982 to 1986, are subject to a ten-year statute of repose. KRS 413.130(3). These time periods are not altered by the fact that Askin's claims may have accrued in another state; Kentucky "borrows" the other state's limitation period only if it is shorter than Kentucky's comparable statute. KRS 413.320; *Seat v. E. Greyhound Lines, Inc.*, 389 S.W.2d 908, 909-910 (Ky. 1965) ("If the statute of limitations in the foreign state is for a longer period of time than the statute provides in this state, then the law of Kentucky will prevail."). Here, the Kentucky one-year statute of limitations for personal injury claims applies to Askin's negligence claim because it is shorter than the corresponding Indiana two-year statute of limitations. *Compare* KRS 413.140(1)(a) *with* Ind. Code § 34-11-2-4(a). Additionally, the Kentucky ten-year statute of repose, KRS 413.130(3), applies to Askin's fraud claims because Indiana does not have a similar statute of repose. KRS 413.320.[2]

III. Askin's negligence claim is barred by the one-year statute of limitations.

Askin's negligence claim is subject to Kentucky's statute of limitations for "injury to the person of the plaintiff." KRS 413.140(1)(a). A personal injury claim must be brought "within

[2] Although Indiana has codified a ten-year statute of repose for product liability and construction actions, *see* Ind. Code § 34-20-3-1 & Ind. Code § 32-30-1-5, no similar statute exists for fraud claims. Rather, fraud claims are governed by a six-year statute of limitations. Ind. Code § 34-11-2-7(4).

one (1) year after the cause of action accrued." KRS 413.140(1). Because Askin's claim accrued no later than 1986—his final season playing football at Notre Dame—he commenced this action more than thirty years too late.

A. Askin's negligence claim accrued at the time he sustained injuries while playing football at Notre Dame.

"[T]he general rule in Kentucky is that an action 'accrues' on the date of injury." *Underwood v. Metts*, No. 2018-CA-000124-MR, 2019 Ky. App. Unpub. LEXIS 179, at *6 (Ky. App. Mar. 22, 2019) (quoting *Caudill v. Arnett*, 481 S.W.2d 668, 669 (Ky. App. 1972)).[3] This is true even where a plaintiff is not made fully aware of the extent of his injury until years later.

In *Caudill*, the seminal case on this issue, Kentucky's high court rejected a plaintiff's attempt to bring a belated personal injury claim. The plaintiff in *Caudill* suffered minor injuries in a school bus accident at the age of fifteen. 481 S.W.2d at 668. Six years later, he was diagnosed with chronic pancreatitis, a condition the treating physician opined was caused by the earlier bus accident. *Id*. at 669. The trial court dismissed the plaintiff's claim on the pleadings as untimely and barred by the statute of limitations. *Id*. at 668.

On appeal, the plaintiff argued that his cause of action did not accrue until "the day when exploratory surgery revealed for the first time the chronic pancreatitis that had resulted from the injury sustained in the school-bus accident . . ." *Id*. at 669. The Court rejected this argument, holding that the diagnosis was not the "discovery of injury, but rather the *ascertainment of the extent* of a previously recognized injury." *Id*. (emphasis added) (internal quotation omitted). The Court concluded:

[3] As required by CR 76.28(4)(C), copies of unpublished cases are attached as **Exhibit 1**.

> The appellant's cause of action came into existence or *accrued on the day he was injured* in the school-bus accident, and limitations began to run from that date *even though he was not made fully aware of the extent of his injury until several years later*.

Id. (emphasis added). *Caudill* confirmed that in Kentucky, a claim accrues on "the day the injury [is] inflicted," even if that injury initially appears minor and the plaintiff later discovers a more serious condition resulting from the injury. *Id*. at 669 (internal citation omitted). Indeed, "[i]t is not required that all the damages resulting from the act shall have been sustained at [the time of the initial incident], and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date." *Id*. at 669-670 (quoting 51 AM.JUR.2D, *Limitations of Actions*).

Kentucky state and federal courts have repeatedly affirmed and applied *Caudill*'s holding.[4] The Kentucky Supreme Court employed similar reasoning in *Farmers Bank & Trust Co. v. Rice*, a medical malpractice case involving a doctor's misdiagnosis of cancer as a more benign condition. 674 S.W.2d 510 (Ky. 1984).[5] Once the misdiagnosis was discovered, the plaintiff received treatment and her cancer went into remission. *Id*. at 511. More than two years later—after the one-year statute of limitations for a medical malpractice claim had expired—the plaintiff experienced a severe return of her cancer and brought suit. *Id*. The Court ruled that the plaintiff's claim was barred because the statute of limitations began to run when the plaintiff

[4] *See, e.g., Asher v. Unarco Material Handling, Inc*., No. 6: 06-548-DCR, 2008 U.S. Dist. LEXIS 50288, at *16-19 (E.D. Ky. June 20, 2008) (where plaintiffs contended they were not aware of permanent nature of their injuries until a later date, lack of knowledge as to the extent of his injury did not toll a statute of limitations) (citing *Caudill*, 481 S.W.2d at 669); *Hall v. Warren Cty. Reg'l Jail*, No. 1:09-CV-00098, 2010 U.S. Dist. LEXIS 3007, at *5 (W.D. Ky. Jan. 14, 2010) ("The time period begins to run on the date of injury to the person regardless of whether the extent of the injury is known."); *Drake v. Miller*, No. 3:08-CV-00552-TBR, 2009 U.S. Dist. LEXIS 119370, at *14 (W.D. Ky. Dec. 22, 2009) (same).

[5] *Farmers Bank*—in contrast with this case—involved a medical malpractice claim to which the discovery rule applies by statute (*see* Section III(B)(1) *infra*), but the Court applied the same reasoning as *Caudill* to bar the plaintiff's claim.

knew or reasonably should have known of the conduct at the basis of her action—the doctor's misdiagnosis of her cancer. *Id*. Like *Caudill*, the fact that the "full extent of the injury" of malpractice may not have become totally apparent until the cancer reappeared did not toll the limitations period. *Id*.

Here, Askin's negligence claim accrued when he suffered head injuries while playing football at Notre Dame between 1982 and 1986. Specifically, Askin seeks to recover for brain damage he alleges was caused by head injuries that he experienced while participating in practices and games. The Complaint alleges that Askin sustained four concussions while playing football at Notre Dame. (Compl. ¶ 80.) It further alleges that he sustained "many more concussive and sub-concussive injuries while [he] played football on the Notre Dame team . . ." (*Id*. ¶ 82.) Askin alleges that throughout his five years playing football at Notre Dame, he sustained "repetitive head impacts" (*id*. ¶¶ 11, 66-67), that he experienced "concussive symptoms" (*id*. ¶¶ 75, 78, 82), and that student-athletes on the Notre Dame team had their "bell rung" (*id*. ¶ 76).

Under *Caudill*, Askin's claim accrued at the time he experienced these head injuries, however minor they may have seemed at the time. Askin seeks to avoid the statute of limitations by alleging that he was not diagnosed until the year 2018 with "neurodegenerative disease that is most likely CTE [chronic traumatic encephalopathy]." (Compl. ¶¶ 69, 154.) But these allegations do not save Askin's claim. In fact, the same legal theory was soundly rejected in *Caudill*, where the plaintiff pointed to his chronic pancreatitis diagnosis, years after his initial injury, in an attempt to extend the limitations period. As discussed above, the Court found that the plaintiff's claim accrued on the day he was injured—the date of the bus accident—"even though he was not made fully aware of the extent of his injury until several years later." *Caudill*,

481 S.W.2d at 669. The same is true in this case: Askin's claim accrued at the time he was injured playing football at Notre Dame—between 1982 and 1986—even though he allegedly was not aware of the full extent of those injuries until his 2018 diagnosis. Although Askin alleges that he now suffers from long-term medical conditions, "the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date." *Id*. at 669-670.

B. The discovery rule does not apply to Askin's negligence claim.

The Complaint mistakenly presumes that the "discovery rule" tolls the statute of limitations because Askin allegedly did not discover the full effects of his football injuries until 2018. This is legally incorrect under *Caudill* and its progeny because—as a threshold matter—the discovery rule does not apply to personal injury claims, with one narrow judicially created exception for toxic chemical exposure not applicable here.[6]

1. Kentucky courts have refused to extend the discovery rule beyond the General Assembly's statutory enactments.

The discovery rule does not apply to personal injury claims like the negligence claim asserted by Askin. Rather, by statute, the rule applies only to medical malpractice and professional malpractice claims. KRS 413.140(2) (stating that for medical malpractice claims, "the cause of action shall be deemed to accrue at the time the injury is first discovered or in the exercise of reasonable care should have been discovered"); KRS 413.245 & KRS 413.140(3) (extending the discovery rule to professional malpractice claims).

"Kentucky courts have generally refused to extend the discovery rule without statutory authority to do so." *Roman Catholic Diocese v. Secter*, 966 S.W.2d 286, 288-91 (Ky. App.

[6] Askin has the burden of showing that the discovery rule applies to his claims. *See Se. Ky. Baptist Hosp., Inc. v. Gaylor*, 756 S.W.2d 467, 469 (Ky. 1988) ("Once the statute of limitations is raised, the burden falls on the complainant to prove such facts as would toll the statute. . . ."); *see also Cawood v. Middleton*, 261 S.W. 242, 243 (Ky. 1924) (once the defendant makes a prima facie case that the claim is barred by the statute of limitations, "the burden was on [plaintiff] to show that they were within the exception").

1998). As the Sixth Circuit observed, "Kentucky's courts have cautioned against judicial efforts to expand the discovery rule without legislative authorization." *Asher v. Unarco Material Handling, Inc.*, 596 F.3d 313, 322 (6th Cir. 2010). For example, Kentucky courts have refused to extend the discovery rule to actions involving product liability, interference with marital relationship, and construction defects. *Fluke Corp. v. LeMaster*, 306 S.W.3d 55, 56 (Ky. 2010); *Plummer v. Summe*, 687 S.W.2d 543, 544 (Ky. App. 1984); *Housing Now-Village West, Inc. v. Cox & Crawley, Inc.*, 646 S.W.2d 350, 352 (Ky. App. 1982). Courts have declined to apply the discovery rule beyond the General Assembly's legislative mandate even when that has yielded harsh results, such as barring a plaintiff from bringing a childhood sex-abuse claim when he had repressed memories of the abuse that did not return until years later. *Rigazio v. Archdiocese of Louisville*, 853 S.W.2d 295, 297 (Ky. App. 1993).

2. Askin's negligence claim does not fall within the narrow exception for disease resulting from exposure to toxic chemicals.

The Kentucky Supreme Court has extended the discovery rule beyond its statutory parameters in only one context: where the plaintiff was exposed to toxic chemicals that caused no injury at the time, but later manifested in disease. *Louisville Trust Co. v. Johns-Manville Products Corp.*, 580 S.W.2d 497, 501 (Ky. 1979) (applying discovery rule to latent malignant mesothelioma resulting from asbestos exposure years earlier); *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809, 819 (Ky. 1991) (applying discovery rule to plaintiff who allegedly developed non-Hodgkin's lymphoma as a result of exposure to a Pentachlorophenol coating on logs used to build her home).

The rationale underlying this judicially created discovery rule exception is that the statute of limitations should not bar a claim where a plaintiff's injury "does not manifest itself immediately" and where the plaintiff could not have known of the "possible causal connection"

between her injury and the defendant's conduct. *Louisville Trust Co*., 580 S.W.2d at 500. Significantly, the *Louisville Trust* Court distinguished the toxic chemical exposure at issue from the facts present in *Caudill*: "It was undisputed [in *Caudill*] that on the occasion of the accident plaintiff *knew that he was injured* as a result of the conduct of the defendant's employee, the school bus driver. Plaintiff's lack of knowledge *of the extent of his injury* does not toll a statute of limitations to which the discovery rule is applied." *Id*. (emphasis added).

This toxic chemical exposure exception does not apply to Askin's claims, which are squarely governed by *Caudill*. Unlike the plaintiff in *Louisville Trust*—who did not suffer any injury that "manifest[ed] itself immediately" and who had no reason to know of the defendant's role in causing his later-developing medical condition—Askin alleges that he suffered immediate physical injuries while playing football at Notre Dame when he experienced four concussions and many other concussive and sub-concussive impacts. (Compl. ¶¶ 80, 82.) Just like the plaintiff in *Caudill*, Askin alleges that he knew the defendant caused these injuries: the Complaint alleges that Notre Dame coaches and trainers exposed Askin to multiple head injuries by allegedly encouraging certain tackling and playing techniques and by ordering injured players to continue to participate in practice or games. (*Id*. ¶¶ 47, 76.) In fact, Askin acknowledges that he and other Notre Dame football student-athletes were well aware of the alleged wrongful nature of the coaches' and trainers' conduct, but chose to ignore that conduct and continue playing because they feared they might otherwise lose their spot on the team or athletic scholarship. (*Id*. ¶ 76.)

The Sixth Circuit Court of Appeals, comparing *Caudill* and *Louisville Trust*, held that *Caudill* applied to a claim brought by a plaintiff for exposure to carbon monoxide because the plaintiff—like Askin, and unlike a toxic tort plaintiff—experienced immediate symptoms from

the exposure. *Asher*, 596 F.3d at 320-22. *Asher* confirms that under Kentucky law, the discovery rule does not apply to the claims of a plaintiff like Askin, who suffered an immediate physical injury at the time of the alleged tortious conduct, alleges that his injury was the result of the defendant's conduct, and alleges that he knew the identity of the tortfeasor at the time he sustained his injury.

Askin likely will argue that the discovery rule should apply to his claim based on allegations that he suffers from a "latent neurodegenerative brain disease" (*id*. ¶ 20), bringing this case within the rule of *Louisville Trust* and other cases involving latent injuries resulting from exposure to toxic substances. Askin's attempt to label his condition as a "latent" disease, however, does not trigger the applicability of the discovery rule under *Twombly*'s plausibility standard. *McDaniel*, 495 S.W.3d at 121 n.6. The *factual* allegations pleaded in the Complaint—that Askin suffered concussions and other head injuries and experienced concussive symptoms—establish that, as a matter of law, the discovery rule does not apply to his claim, which seeks recovery for the long-term effects of injuries he suffered years ago. Askin cannot salvage his stale claim merely by affixing the label "latent" to his allegations.

Indeed, the Complaint's very use of the term "latent" to describe the essence of Askin's claim demonstrates that the claim does not qualify for the discovery rule. The Complaint makes 66 references to the word "latent," including within allegations that Notre Dame (i) "knew for decades of the harmful long-term and *latent effects of MTBI*" but ignored these facts and failed to protect student-athletes (*id*. ¶ 132); (ii) knew or should have known about medical literature regarding the "*latent effects* of mild traumatic brain injuries" (*id*. ¶ 7); (iii) placed Askin at an elevated risk of the "long-term *latent effects* of MTBI" (*id*. ¶ 9); and (iv) failed to protect Askin from the "*latent effects* of MTBI in college football" (*id*. ¶ 102) (emphases added). Through

these allegations, Askin concedes that his claim fundamentally seeks to challenge the latent *effects* of injuries he sustained more than thirty years ago at Notre Dame, and is not based on the injuries themselves being latent. As set forth above, the statute of limitations begins to run when a plaintiff has knowledge of an injury, not when a she discovers the full extent of the effects of that injury. *Caudill*, 481 S.W.2d at 669.

Finally, Askin likely will argue his negligence claim is timely based on a recent Ohio Supreme Court decision in another case brought by his attorneys against Notre Dame, on behalf of a different former football player, *Schmitz v. NCAA*, 2018 Ohio LEXIS 2614, 2018-Ohio-4391 (Oh. 2018). In *Schmitz*, the court allowed the plaintiffs' claims to survive the pleading stage because it applied the discovery rule pronounced in an earlier Ohio case, *Liddell v. SCA Servs. of Ohio*, 635 N.E.2d 1233 (Oh. 1994), which involved a police officer who inhaled toxic fumes while responding to a bus accident. *See Schmitz*, 2018-Ohio-4391, ¶ 26 (internal citations omitted). The *Liddell* court tolled the statute of limitations until the date the officer's resulting cancer was discovered, notwithstanding the fact that he was visibly injured, collapsed, and received medical treatment on the date of the bus accident. 635 N.E.2d at 1235-36. Of course, neither *Schmitz* nor *Liddell* is binding law in Kentucky. In stark and significant contrast, courts in Kentucky have adhered to the longstanding rule of *Caudill* (which like *Liddell* involved injuries relating to a bus accident, but reached the opposite conclusion): where a plaintiff experiences an immediate injury arising from the defendant's conduct, the discovery rule is inapplicable.

C. Even if the discovery rule applied, Askin's claim still would be untimely.

Even if the discovery rule were extended beyond the current legislative and judicial exceptions to reach Askin's negligence claim, the result would not change: the claim should be

dismissed under the statute of limitations because Askin had actual or constructive knowledge of both his injuries and the cause of those injuries.

In the narrow circumstances when the discovery rule applies, the statute of limitations "begins to run on the date of the discovery of the injury, or from the date it should, in the exercise of ordinary care and diligence, have been discovered." *Wilson v. Paine*, 288 S.W.3d 284, 286 (Ky. 2009) (quoting *Hackworth v. Hart, Ky.*, 474 S.W.2d 377, 379 (Ky. 1971)). Moreover, the plaintiff must know that his injury "may have been caused by" the defendant. *Fluke*, 306 S.W.3d at 60. The "knowledge necessary to trigger" the statute of limitations has been described as "two-pronged": a plaintiff must know both (1) she has been wronged, and (2) by whom the wrong has been committed. *Wilson*, 288 S.W.3d at 286 (citing *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 641 (6th Cir. 1986)).

For a claim to accrue, "definitive knowledge of causation is not needed"—the discovery rule stops tolling the statute once a plaintiff knows, either actually or constructively, that the defendant "may" have caused her injury. *Adams v. 3M Co.*, No. 12-61-ART, 2013 U.S. Dist. LEXIS 94101, at *6 (E.D. Ky. July 5, 2013). Constructive knowledge, through awareness of sufficient "critical facts" to put the plaintiff on notice of a possible claim, will trigger the statute of limitations period. *Boggs v. 3M Co.*, No. 11-cv-57-ART, 2012 WL 3644967, at *3 (E.D. Ky. Aug. 24, 2012) (*aff'd*); *see also Adkins v. Duff*, No. 04-cv-103-HRW, 2004 U.S. Dist. LEXIS 26688, at *9 (E.D. Ky. Aug. 31, 2004) (publicly available information and local and national television news coverage concerning pharmaceutical drug recall put plaintiffs on notice of their potential claim against the drug manufacturer). Put another way, "for purposes of the discovery rule, once the plaintiff encounters facts that 'should excite his suspicion' he effectively has 'actual knowledge of th[e] entire claim.'" *Adams*, 2013 U.S. Dist. LEXIS 94101, at *8. Once a

plaintiff has knowledge of critical facts, he or she has a duty to act with reasonable diligence to discover the identity of the tortfeasor and commence an action within the statutory period. *Id*.

The Complaint alleges that Askin had actual knowledge—way back in 1982 to 1986—that (1) he had been wronged, and (2) by whom the wrong was committed. Askin alleges that, during this five-year period when he played football at Notre Dame, he sustained multiple injuries (including at least four concussions) as a direct result of the alleged misconduct of Notre Dame coaches and trainers. (Compl. ¶ 80) ("John Askin sustained four concussions as a player at Notre Dame that were recorded by Notre Dame."); (*id*. ¶ 47) ("Notre Dame . . . encouraged and/or caused MTBI to Notre Dame football players in practices and games."). Thus, Askin possessed the requisite "knowledge necessary to trigger the statute" of limitations at least by 1986, if not earlier. *Wilson*, 288 S.W.3d at 286. Again, the relevant inquiry under Kentucky law is the date Askin sustained an injury, not the date he was "made fully aware of the extent" of his injury. *Caudill*, 481 S.W.2d at 668. The Complaint's suggestion that Askin had "no evidence" of any "mental malfunction" or brain disease (i.e., the extent of his 1982 to 1986 injuries) until his 2018 diagnosis overlooks this critical distinction. (Compl. ¶¶ 69, 152, 176.)

Putting aside these allegations demonstrating Askin's actual knowledge of injury, the Complaint also reveals that Askin, at a bare minimum, had longstanding constructive knowledge sufficient to trigger the running of the statute of limitations—arguably as early as his playing days, but no later than 2010 when the NCAA passed legislation requiring its member institutions to have a concussion management plan in place for all sports. (*Id*. ¶ 143.) As discussed above, Askin's apparent legal theory is that the statute of limitations did not begin to run until 2018, when he allegedly first learned the full extent of his 1982 to 1986 injuries and the connection between playing football and brain disease. But the Complaint goes to great lengths to detail the

body of publicly available information supposedly linking head injuries experienced while playing football and long-term brain disease. (*Id*. ¶¶ 102-135.) This includes information published (i) long before Askin was born (a 1933 NCAA medical manual that allegedly "acknowledged the risks of long-term brain disease in football players," a 1937 report from the American Football Coaches Association warning that "players who suffer a concussion should be removed" from the field, and a 1952 New England Journal of Medicine article recommending that players cease playing football permanently after experiencing a third concussion); (ii) during Askin's playing days at Notre Dame (1982 studies conducted by the University of Virginia and other institutions allegedly linking brain damage to college football players and a 1986 publication setting forth Concussion Grading Guidelines); and (iii) in more recent sources that have garnered national media attention (2005-2007 studies of retired athletes finding "a strong correlation between depression, dementia, and other cognitive impairment in professional football players and the number of concussions those players had received" and the 2010 NCAA concussion management plan legislation). *Id*.[7]

The Complaint thus establishes that, even if Askin's claims were subject to the discovery rule, they accrued well over one year before his filing of this suit. The Complaint details the very "sufficient critical facts" that put Askin on constructive notice, as a matter of law, that he "may have been" harmed by Notre Dame, triggering accrual of his claim. *Boggs*, 2012 WL 3644967, at *3. Indeed, Askin alleges that, at the very time he suffered four concussions while

[7] In addition, although these sources are not referenced in the Complaint, the Court may take judicial notice of the numerous lawsuits filed by former football players against the NFL, NCAA, Notre Dame, and other universities containing allegations similar to those asserted by Askin—well over one year before Askin filed this lawsuit. *Fox v. Grayson*, 317 S.W.3d 1, 18 n.82 (Ky. 2010) ("A court may properly take judicial notice of public records and government documents, including public records and government documents available from reliable sources on the internet.") This prior litigation includes the *Schmitz* case referenced in Pt. III(B) *infra*, which was brought against Notre Dame in 2014 (five years ago) by several of the same attorneys who now represent Askin in this lawsuit.

playing football at Notre Dame, there existed a long-established body of literature cautioning players about the alleged link between head injuries and football. While Askin imputes knowledge of these publicly available materials to Notre Dame, he disclaims any personal knowledge himself. (Compl. ¶ 69) ("At no time while he was a player at Notre Dame *or until he was diagnosed in 2018* did [he] ever know or suspect that he had been exposed to an increased risk of long-term latent neurodegenerative brain disease and the insidious and latent disease known as CTE.") This allegation is simply not plausible. *McDaniel*, 495 S.W.3d at 121 n.6 (citing *Iqbal* and *Twombly*). Askin's professed lack of knowledge prior to his 2018 diagnosis is belied not only by the vast amount of publicly available information identified in the Complaint, but by its allegations that Askin suffers from symptoms that arise gradually (not suddenly), including "varying forms of neuro-cognitive disability, decline, personality change, [and] forgetfulness . . ." (*Id.* ¶ 175).

D. Dismissal of Askin's claim furthers the public policy objectives underlying the statute of limitations.

Applying the statute of limitations in this case serves the rationales underpinning limitations on actions. As the Supreme Court has explained, "[t]he Kentucky General Assembly and this Court have long recognized the value of statutes which 'bar stale claims arising out of transactions or occurrences which took place in the distant past.'" *Munday v. Mayfair Diagnostic Lab.*, 831 S.W.2d 912, 914 (Ky. 1992) (internal citation omitted). Statutes of limitations are designed "to prevent the bringing of claims when, due to the passage of time, evidence is lost, memories have faded and witnesses are unavailable. Thus, at some point, the right of a defendant to be free from stale claims, even if meritorious, prevails over the right to prosecute them." *Alcorn v. Gordon*, 762 S.W.2d 809, 812 (Ky. App. 1988).

The crux of Askin's allegations against Notre Dame is that football coaches and trainers failed to protect him from the risk of concussions and sub-concussive injuries more than thirty years ago. Several individuals who would be critical witnesses, including Askin's position coach for his first four years of college, Jim Higgins, are deceased, and everyone involved has memories that have faded over the course of more than three decades. The statute of limitations aims to prevent the fundamental uncertainty and unfairness of defending against a proceeding brought after the passage of so much time. The Court should apply KRS 413.140(1) in accordance with its terms and dismiss Askin's claims against Notre Dame.

IV. Askin's fraud claims are barred by a ten-year statute of repose.

Askin asserts two claims against Notre Dame sounding in fraud: fraudulent concealment (Count II) and constructive fraud (Count III). Although these claims lack legal viability on the merits, they fail as a threshold matter because they are barred by the statute of repose for fraud claims. KRS 413.130(3). The statute of repose requires a plaintiff to commence her fraud claim within ten years after the perpetration of the alleged fraud:

> In an action for relief or damages for fraud or mistake, referred to in subsection (11) of KRS 413.120 [an action for relief or damages on the ground of fraud or mistake], the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake. However, the action *shall be commenced within ten (10) years after the time of making the contract or the perpetration of the fraud*.

KRS 413.130(3) (emphasis added). The statute of repose is not subject to the "discovery rule": it imposes a strict ten-year limit within which a fraud claim must be brought, regardless of when the claim accrues. *See Dodd v. Dyke Indus.*, 518 F. Supp. 2d 970, 973 (W.D. Ky. 2007).

Kentucky state and federal courts routinely apply the statute of repose in KRS 413.130(3) to bar fraud claims brought over ten years after the alleged fraudulent conduct. *See, e.g., Fed. Ins. Co. v. Woods (In re Woods)*, 558 B.R. 164, 172 (Bankr. W.D. Ky. 2016) ("Kentucky's

statute of repose imposes an absolute bar to actions for fraud commenced more than ten years after the perpetration of the fraudulent act. . . any act of fraud committed before June 19, 2005 (more than ten years earlier), would be absolutely excluded."); *Allen v. Lawyers Mut. Ins. Co.*, 216 S.W.3d 657, 662 (Ky. App. 2007) (holding that KRS 413.130(3) was dispositive of lawyer's fraudulent inducement claims based on subscription agreement entered into more than ten years before filing of complaint).

Applied here, the ten-year statute of repose bars Askin's fraudulent concealment and constructive fraud claims. These two claims share a common predicate, alleging that Notre Dame knew "[a]s early as 1933, and certainly between 1982-86" that "repetitive head impacts in football games and full-contact practices created a substantial risk of latent brain disease," (Compl. ¶¶ 181, 192), but that Notre Dame "failed to inform football players, including John Askin, of these risks" (*id.* ¶¶ 183, 194). The Complaint thus alleges that Notre Dame "perpetrated the fraud" on Askin between 1982-86, when Askin was playing football at Notre Dame. Because the Complaint was filed in 2019, Askin's fraudulent concealment and constructive fraud claims are well outside the ten-year statute of repose in KRS 413.130(3).[8]

V. Punitive damages is not an independent cause of action.

Count IV of the Complaint purports to assert a cause of action for "punitive damages." Punitive damages is not an independent cause of action but, rather, simply an element of damages available in cases where it is appropriate to submit a punitive damages instruction to the

[8] Askin's fraud claims are also barred by Kentucky's statute of limitations, which requires such claims to be brought within five years of the date of accrual. KRS 413.120(11). In Kentucky, "[i]t has long been the rule that in order to recover damages resulting from a recently discovered fraud, the plaintiff must allege the time and means of discovery, why earlier discovery had not occurred and the diligence exercised by the injured party to discover the fraud." *Boone*, 550 S.W.2d at 573. Here, the Complaint is silent about when Askin first learned of the alleged link between his injuries and football: he does not even attempt to plead facts explaining why the alleged fraud committed by Notre Dame was not discovered earlier, let alone when or how he discovered this supposed fraud. In any event, because the ten-year statute of repose bars Askin's fraud claims, the Court need not reach these issues.

jury based on the nature of the defendant's underlying tortious conduct. *Warndorf v. Otis Elevator Co.*, No. CV 17-159-DLB-CJS, 2019 U.S. Dist. LEXIS 3292, at *10-11 (E.D. Ky. Jan. 8, 2019) ("A punitive damages claim . . . is not a separate cause of action, but a remedy potentially available for another cause of action.") (internal quotation omitted); *Southwynd, LLC v. PBI Bank, Inc.*, No. 3:13CV-00952-S, 2014 U.S. Dist. LEXIS 77997, at *9 (W.D. Ky. June 9, 2014) ("[A] punitive damages claim is not an independent cause of action, but . . . certain torts entitle a plaintiff to punitive damages.") (citing *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 389 (Ky. 1985)). Accordingly, where a plaintiff's "underlying tort claims" are dismissed, a claim for punitive damages also must be dismissed. *Russell v. Rhodes*, No. 2003-CA-000923-MR, 2005 Ky. App. Unpub. LEXIS 116, at *14 (Ky. App. Apr. 1, 2005); *Warndorf*, 2019 U.S. Dist. LEXIS 3292, at *10-11 ("a plaintiff must have other viable claims in order to be awarded punitive damages"). Because Askin does not have any viable, timely, underlying claims, he cannot be entitled to punitive damages.

CONCLUSION

For the foregoing reasons, the University of Notre Dame du Lac respectfully requests that all of the claims in the Complaint be dismissed in their entirety, with prejudice.

Respectfully submitted,

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I certify that on April 19, 2019, a copy of the foregoing was filed electronically through the KYeCourts system, which will serve a copy on the following counsel of record in this case:

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CASE NO. 19-CI-01063

JEFFERSON CIRCUIT COURT
DIVISION TEN
JUDGE ANGELA McCORMICK BISIG
ELECTRONICALLY FILED

JOHN P. ASKIN — PLAINTIFF

v.

ORDER

UNIVERSITY OF NOTRE DAME, DU LAC and NATIONAL COLLEGIATE ATHLETIC ASSOCIATION — DEFENDANTS

* * * * *

Upon motion of Defendant University of Notre Dame du Lac to dismiss the plaintiff's complaint, the Court, having heard arguments, and being otherwise sufficiently advised,

HEREBY ORDERS that the University of Notre Dame du Lac's motion is **GRANTED**. All claims against the University of Notre Dame du Lac are hereby **DISMISSED WITH PREJUDICE**. There being no just reason for delay, this is a final and appealable judgment under CR 54.02(1).

_____
JUDGE, JEFFERSON CIRCUIT COURT

Date: _____

TENDERED BY:

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EXHIBIT 1

Underwood v. Metts

Court of Appeals of Kentucky

March 22, 2019, Rendered

NO. 2018-CA-000124-MR

Reporter
2019 Ky. App. Unpub. LEXIS 179 *; 2019 WL 1313144

WINFIELD UNDERWOOD, APPELLANT v. DAVID METTS, APPELLEE

Prior History: [*1] APPEAL FROM JEFFERSON CIRCUIT COURT. HONORABLE CHARLES L. CUNNINGHAM, JUDGE. ACTION NO. 17-CI-003215.

Counsel: BRIEF FOR APPELLANT: Edward L. Cooley, Lexington, Kentucky.

BRIEF FOR APPELLEE: Benjamin L. Riddle, Louisville, Kentucky.

Judges: BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND K. THOMPSON, JUDGES. ALL CONCUR.

Opinion by: CLAYTON

Opinion

AFFIRMING

CLAYTON, CHIEF JUDGE: Winfield Underwood appeals from the Jefferson Circuit Court's order dismissing his complaint pursuant to Kentucky Rules of Civil Procedure (CR) 12.02. Finding no error, we affirm.

BACKGROUND

Underwood was the sole member of a limited liability company, Lost Lodge Properties, LLC ("Lost Lodge") which operated Bluegrass Indoor Range in Louisville, Kentucky (the "Range"). David Metts was the sole member of a limited liability company, Tactical Guns and Gear, LLC ("Tactical"), which specialized in the sale of merchandise associated with weapons and tactical defense. Beginning in late 2011 and early 2012, Underwood and Metts began discussing, and subsequently entered into, a business arrangement whereby they would both operate separate, but complimentary, businesses at the Range. However, no written contracts or agreements laid out how the two businesses would operate in relation to the

other, or any other aspects [*2] of the parties' relationship. The parties initially agreed that the two businesses would use the same point of sale system ("POS System"), with Lost Lodge entering Tactical's products and services into the POS System and adding Tactical as a separate vendor. Each month, Underwood would pay Tactical for its sales.

Eventually, the parties began to differ concerning the distribution of the profits from and expenses for the two businesses. At various times starting in January 2012, Underwood and Metts discussed Tactical's purchase of Lost Lodge's interest in the Range, but no terms were ever agreed upon by the parties. In late May of 2012, Metts called a meeting at which he, Underwood, and other Range employees were present. At the meeting, Metts informed Underwood that he was taking over the physical operation of the Range, and again offered to buy out Lost Lodge's interest. Metts further advised at the meeting that he had instructed his employees to convert Lost Lodge's current POS System to a system operated and maintained exclusively by Tactical without the permission or consent of Underwood. Further, correspondence from Metts and his counsel to Underwood dated June 22, 2012, informed [*3] Underwood that Tactical was again offering to purchase the Range. The offer expired on June 28, 2012, and, because Underwood did not agree with the price that Metts offered, was not accepted by Underwood.

Tactical filed a lawsuit against Lost Lodge and Underwood in Jefferson Circuit Court on August 27, 2012, alleging promissory estoppel, unjust enrichment, and fraud. Lost Lodge filed an answer and counterclaim against Tactical alleging fraud, conversion, tortious interference with business relationships, and unjust enrichment.

The Jefferson Circuit Court held a bench trial on December 8, 2016. At the bench trial, Underwood testified and provided further information about the events that transpired at the May 2012 meeting, stating that Metts had informed Underwood at the meeting that he had installed a new POS System, transferred all of the banking accounts to his name, changed the locks and the security system at the Range, taken control of the credit cards, "and that from then on [Metts] would be running the [R]ange." Upon the conclusion of the bench trial, Lost Lodge received a judgment in the amount of $104,765.00, with the trial court finding that Tactical had converted Lost Lodge's [*4] property.

On June 21, 2017, Underwood filed a complaint against Metts in his individual capacity alleging tortious interference with business relationships, unjust enrichment, and fraud due to "[t]he actions of [Metts] in directing the seizure of [Underwood's] business by [Tactical], owned by the defendant[.]" Metts filed a motion to dismiss the action pursuant to CR 12.02. The Jefferson Circuit Court granted the motion to dismiss on the grounds of Underwood's failure to file the complaint within the statute of limitations, failure to file a mandatory counterclaim, and lack of standing to bring the action. Underwood subsequently filed this appeal.

ANALYSIS

The Jefferson Circuit Court dismissed Underwood's complaint pursuant to CR 12.02 for failure to state a claim. Based upon our review of the record, we gather from the court's order that it considered matters outside the pleadings in reaching its decision on the motion to dismiss, namely the inclusion by Metts with his motion to dismiss portions of Underwood's testimony at the bench trial concerning the May 2012 meeting between the parties. A trial court may consider matters

outside the pleadings and, if not excluded by the court, such consideration [*5] converts the request for dismissal into a motion for summary judgment. CR 12.02; *McCray v. City of Lake Louisvilla*, 332 S.W.2d 837, 840 (Ky. 1960).

The applicable standard of review on appeal of a summary judgment is, "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781, 43 1 Ky. L. Summary 17 (Ky. App. 1996) (citing CR 56.03). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (internal citations omitted). Summary judgment is proper only "where the movant shows that the adverse party cannot prevail under any circumstances." *Id.* at 479. However, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482.

Since "summary judgment involves [*6] only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001). With these standards in mind, we turn to the first issue on appeal concerning whether the applicable statute of limitations barred Underwood's claims.

In his complaint, Underwood alleged claims against Metts in his individual capacity for tortious interference with contractual claims, unjust enrichment, and fraud. Each of those claims must be brought "within five (5) years after the cause of action accrued[.]" Kentucky Revised Statutes (KRS) 413.120. Specifically, KRS 413.120(6) establishes a five-year statute of limitations for actions based on "an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated." Additionally, KRS 413.120(11) establishes a five-year statute of limitations for "an action for relief or damages on the ground of fraud ...[.]" Moreover, the general rule in Kentucky is that an action "accrues" on the date of injury. *Caudill v. Arnett*, 481 S.W.2d 668, 669 (Ky. App. 1972). The date upon which the statute of limitations begins to run is "obviously ... the discovery that a wrong has been committed and not that the party may sue for the wrong." *Conway v. Huff*, 644 S.W.2d 333, 334 (Ky. 1982).

In this case, the only allegation [*7] that Underwood asserts in his complaint to support his causes of action for tortious interference with contractual relations, fraud, and unjust enrichment is that "the actions of [Metts] in directing the seizure of [Underwood's] business by [Tactical]" constituted a tortious interference with ongoing and prospective business relationships, unjust enrichment, and fraud. However, Underwood testified at the bench trial that Metts notified him about both Metts's physical seizure of the business, as well as his alterations to the POS System at the Range, in May of 2012. Simply put, the only activities upon which Underwood's causes of action against Metts are founded - the seizure of Underwood's business and the changes to the POS System - occurred in late May of 2012.

Underwood acknowledged in his response to the motion to dismiss that he was aware of Metts's physical takeover of the business and the conversion of the POS System in May of 2012, but argues that the statute of limitations did not begin to run until he received Metts's June 22, 2012 letter setting forth a sale price for the business with which Underwood did not agree. However, under Kentucky law, a cause of action accrues, [*8] and therefore the limitations period begins to run, when a party knows that he has been wronged, not when he knows that the wrong is actionable. *Conway*, 644 S.W.2d at 334. As a result, the limitations period for Underwood's claims expired, at the latest, on May 31, 2017. Underwood filed the action in the case *sub judice* on June 21, 2017. Therefore, Underwood's claims are barred by the statute of limitations and "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." CR 56.03.

The remaining arguments in the briefs are rendered moot by this Court's determination that the five-year statute of limitations barred Underwood's claims against Metts. The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

End of Document

Russell v. Rhodes

Court of Appeals of Kentucky

April 1, 2005, Rendered

NO. 2003-CA-000923-MR, NO. 2004-CA-000492-MR

Reporter
2005 Ky. App. Unpub. LEXIS 116 *

MICHAEL R. RUSSELL, APPELLANT v. DANNY L. RHODES; REGIONAL AIRPORT AUTHORITY OF LOUISVILLE, AND JEFFERSON COUNTY REGIONAL AIRPORT AUTHORITY OF LOUISVILLE AND JEFFERSON COUNTY D/B/A AIRPORT POLICE; SOUTHWEST AIRLINES CO., APPELLEES AND MICHAEL R. RUSSELL, APPELLANT v. SOUTHWEST AIRLINES CO.; TRACY WRIGHT RAFFO; AND JOE VANDERWIEL, APPELLEES

Notice: THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Prior History: [*1] APPEAL FROM JEFFERSON CIRCUIT COURT. HONORABLE LISABETH HUGHES ABRAMSON, JUDGE. ACTION NO. 00-CI-007416. APPEAL FROM JEFFERSON CIRCUIT COURT. HONORABLE LISABETH HUGHES ABRAMSON, JUDGE. ACTION NO. 00-CI-007416.

Counsel: BRIEF FOR APPELLANT: Harley N. Blankenship, Louisville, Kentucky.

BRIEF FOR APPELLEES SOUTHWEST AIRLINES CO., TRACY WRIGHT RAFFO AND JOE VANDERWIEL: Edward H. Stopher, Rod D. Payne, Boehl, Stopher & Graves, LLP, Louisville, Kentucky.

BRIEF FOR APPELLEE REGIONAL AIRPORT AUTHORITY, ET AL: Bethany A. Breetz, Stites & Harbison PLLC, Louisville, Kentucky; Douglas B. Bates, Stites & Harbison PLLC, Jeffersonsville, IN; Scott L. Tyler, Ward, Tyler & Scott, New Albany, IN.

Judges: BEFORE: BUCKINGHAM, KNOPF, AND TAYLOR, JUDGES. All concur.

Opinion by: KNOPF

Opinion

AFFIRMING

KNOPF, JUDGE: On February 18, 1999, Michael R. Russell was arrested for alcohol intoxication by Officer Danny L. Rhodes, a police officer employed by the Regional Airport

Authority of Louisville and Jefferson County (RAA), after Officer Rhodes received a report that Russell had engaged in disruptive behavior on a Southwest Airlines flight. Following dismissal of the criminal charge, Russell filed a complaint against Southwest Airlines, the flight attendants [*2] Tracy Wright Raffo and Joe Vanderwiel, the RAA and Officer Rhodes, alleging malicious prosecution, false arrest, negligence and negligent infliction of emotional distress. In separate orders, the Jefferson Circuit Court granted the defendants' motions for summary judgment and dismissed Russell's complaint. Russell argues that there were genuine issues of material fact which precluded summary judgment. We conclude, however, that even viewing the facts in the light most favorable to Russell, he cannot prevail on his claims. Hence, we affirm.

Russell was a passenger on Southwest Airlines Flight 863 from Phoenix, Arizona to Louisville, Kentucky. The flight attendants noticed that the airplane's lavatory smelled strongly of cigarette smoke after Russell used it. Several flight attendants testified that they smelled cigarette smoke on Russell, as well as alcohol on his breath. When confronted about smoking in the lavatory, the flight attendants testified that Russell admitted to it in a disruptive and threatening manner. The flight attendants also testified that Russell made repeated requests to visit the cockpit of the aircraft.[1] Finally, the flight attendants asserted that Russell interfered [*3] with the flight crew's handling of a medical emergency. The attendants stated that while they were giving medical attention to another passenger, Russell disregarded instructions to remain seated and pushed his way through the aisle to reach the lavatory. The flight attendants state that Russell's actions interrupted their phone consultation with a doctor regarding the other passenger.

Eventually, the flight crew contacted the Louisville airport and alerted the RAA police that one of the airplane's passengers had become disruptive and unmanageable. In response, the RAA police dispatched Officer Rhodes to meet the arriving flight.[2] An attendant pointed out Russell as he left the aircraft. Officer Rhodes testified that Russell smelled strongly of alcohol, had red, blood-shot eyes, and was behaving in a loud and disruptive manner. After talking with Russell for three to five minutes, Officer Rhodes concluded that Russell was a threat to his own security and [*4] to those around him. Consequently, Officer Rhodes placed Russell under arrest and handcuffed Russell's hands behind his back. Ultimately, Officer Rhodes issued Russell a citation for public intoxication[3] and released Russell into the custody of a Meade County Sheriff's deputy.[4]

For the most part, Russell disputes the flight attendants' account of his behavior during the flight. Russell denies that he smoked in the lavatory, that he became disruptive on the aircraft, or that he interfered with the flight crew's performance of their duties. He does not dispute, however, that he had been drinking on the aircraft or that his eyes were bloodshot. He also admitted that he went to the lavatory during the medical emergency, [*5] but he denies that he interfered with the

[1] Russell admitted that he asked to enter the cockpit and he later explained this behavior by relating a childhood experience of visiting an airplane cockpit. Additionally, Rhodes is licensed as a small-aircraft and helicopter pilot.

[2] Officer Rhodes was accompanied by several other RAA police officers, but those officers were not involved in Russell's arrest and are not parties to this action.

[3] KRS 222.202(1).

[4] Russell presented identification that he worked as a deputy sheriff for the Meade County Sheriff's department. It was later determined that Russell volunteered as a helicopter pilot for the Meade County Sheriff's department. He was given the title of special deputy but he did not have any police powers.

flight attendants' attempts to assist his fellow passenger. Russell's traveling companion, Elizabeth Hale, and three other passengers also dispute various aspects of the flight attendants' version of the events. None of Russell's witnesses overheard the conversation with Officer Rhodes or actually witnessed the arrest. Russell states that he was arrested as soon as he left the aircraft, and several of Russell's witnesses agree with this aspect of Russell's account of the arrest.

Russell was tried in the Jefferson District Court on the alcohol intoxication charge. Following testimony from Officer Rhodes, Russell, and Hale, the district court directed a verdict of acquittal. Thereafter, on November 17, 2000, Russell brought this action against Southwest Airlines and the two flight attendants who reported Russell, Tracey Wright Raffo and Joe Vanderwiel. Russell asserted claims against Southwest and the flight attendants for negligence, malicious prosecution, humiliation, and negligent infliction of emotional distress. Russell asserted claims against the RAA and Officer Rhodes for malicious prosecution, false arrest and imprisonment, outrageous [*6] conduct, negligent infliction of emotional distress and assault and battery.

Prior to trial, the Southwest defendants and the RAA defendants separately moved for summary judgment. Russell stipulated that his outrageous conduct and assault claims should be dismissed. In an order entered on February 26, 2003, the trial court dismissed Russell's claims against the RAA and Officer Rhodes. Subsequently, on January 5, 2004, the trial court dismissed Russell's claims against Southwest, Wright Raffo and Vanderwiel. This appeal followed.

> The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381, 39 7 Ky. L. Summary 24 (1992). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). [*7] Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." Steelvest, 807 S.W.2d at 480, *citing* Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor ..." Huddleston v. Hughes, Ky.App., 843 S.W.2d 901, 903 (1992), *citing* Steelvest, *supra (citations omitted)*.[5]

As the trial court correctly noted, the inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial.[6] Although Russell questions this standard, he concedes that discovery was substantially complete and all relevant depositions and affidavits were filed in the record. Therefore, the matter was ripe for summary judgment.

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[5] Scifres v. Kraft, 916 S.W.2d 779, 781, 43 1 Ky. L. Summary 17 (Ky.App. 1996).

[6] Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724, 730, 46 14 Ky. L. Summary 28 (Ky. 1999).

In its February 26, 2003, order, the trial court first addressed Russell's [*8] claim of malicious prosecution as it related to Officer Rhodes. The trial court concluded that Officer Rhodes had probable cause to arrest Russell based on the credible report from Southwest that Russell had disrupted the flight. The trial court also noted that, based on the undisputed facts, Officer Rhodes had probable cause to believe that Russell was publicly intoxicated. Finally, the trial court found that, even if Officer Rhodes lacked probable cause to arrest Russell, there was no evidence that he acted out of malice.

In its January 5, 2004, order addressing the Southwest defendants, the trial court noted that Southwest merely reported Russell's conduct to the RAA. Officer Rhodes did not arrest Russell for that conduct, but for public intoxication, which he observed after Russell left the aircraft. Moreover, the trial court noted that Southwest was not the party responsible for initiating the public intoxication charge and it did not participate in the criminal proceeding. Since Southwest never initiated any proceedings against Russell, the trial court concluded that it could not be liable for malicious prosecution.

The parties agree that there are six basic elements necessary [*9] to the maintenance of an action for malicious prosecution:

> (1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding.[7]

The burden in a malicious prosecution action is on the plaintiff to prove lack of probable cause, and the probable cause issue is a question for the court to decide.[8] Even viewing the evidence in the light most favorable to Russell, we agree with the trial court that Officer Rhodes had probable cause for the arrest. Russell asserts that Officer Rhodes arrested him immediately after he left the aircraft without making any independent inquiry beyond the report made by Southwest to the RAA. However, a report of disruptive behavior on an aircraft by the airline is sufficiently credible to constitute probable [*10] cause for an arrest.[9] At the very least, Russell suggests no reason why the RAA or Officer Rhodes would have cause to doubt the reliability of Southwest's report.

Moreover, as the trial court noted, Russell admitted that he had been drinking on the flight and that his eyes were often bloodshot. When coupled with the report from Southwest about Russell's in-flight behavior, Officer Rhodes's observation of Russell's appearance gave him probable cause to believe that Russell was publicly intoxicated. Furthermore, as the trial court noted, Russell offered no evidence, other than his own opinion, that Officer Rhodes acted out of malice either by arresting him or by charging him with alcohol intoxication. Thus, Russell cannot establish the elements of malicious prosecution and that claim was properly [*11] dismissed.

Likewise, we agree with the trial court that the malicious-prosecution claim against the

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[7] Collins v. Williams, 10 S.W.3d 493, 496, 46 11 Ky. L. Summary 5 (Ky.App. 1999); *citing* Raine v. Drasin, 621 S.W.2d 895, 899 (Ky. 1981).

[8] Prewitt v. Sexton, 777 S.W.2d 891, 894-95 (Ky. 1989).

[9] *See, e.g.*: Lovett v. Commonwealth, 103 S.W.3d 72, (Ky. 2003), holding that when probable cause is based in part on a tip from an informant, the totality-of-the-circumstances test requires a balancing of the relative indicia of reliability accompanying an informant's tip. Id. at 78. *See also* Eldred v. Commonwealth, 906 S.W.2d 694, 705, 41 11 Ky. L. Summary 20 (Ky. 1994).

Southwest defendants also was properly dismissed. Southwest's actions were limited to notifying the police regarding Russell's alleged in-flight behavior and subsequently identifying him to police after the airplane landed. Even if Russell is correct in his assertion that Southwest's flight attendants were acting out of malice and falsely reported his behavior during the flight in question, that behavior was not the basis for the charge of alcohol intoxication. That charge was based entirely on Officer Rhodes's observations after Russell left the aircraft. Southwest did not initiate or participate in the criminal proceedings, and no one from Southwest testified at the trial. Therefore, summary judgment was appropriate.

For the same reason, the trial court properly dismissed Russell's claim against the RAA and Officer Rhodes for false arrest and battery. A cause of action for false arrest will not lie where the officer had reasonable grounds for the arrest and used no more force than necessary.[10] As previously noted, Officer Rhodes had probable cause for the arrest. Furthermore, Officer [*12] Rhodes did not strike or forcefully subdue Russell when making the arrest — he simply handcuffed Russell. Although Russell claims that the handcuffs damaged his hands, he offered no proof of any injury and he admitted that he has never sought medical attention for the alleged injury. In the absence of any proof of unnecessary force, Russell cannot prevail on his claims of false arrest and battery.

Russell next asserts claims of negligence against the Southwest defendants and against the RAA defendants. These claims were also properly dismissed. As previously noted, Officer Rhodes had reasonable grounds to believe that Russell was publicly intoxicated. Even if Officer Rhodes erred in making this assessment, he is entitled to qualified immunity for discretionary acts taken in good faith and within the scope of his official duties.[11]

As for the Southwest defendants, Russell merely asserts that Wright Raffo and Vanderwiel accused him wrongly of misconduct on the flight. Ordinarily, [*13] however, negligence cannot be inferred simply from an undesirable result. Expert testimony is necessary to establish both the standard of care and how the defendants deviated from that standard.[12] The only exceptions involve situations where "any layman is competent to pass judgment and conclude from common experience that such things do not happen if there has been proper skill and care," or where the doctrine of *res ipsa loquitur* is applicable.[13]

Neither exception applies in this case. A crew of an aircraft in flight is charged with enforcing numerous federal regulations regarding the conduct of the passengers. The standard of care under which they must operate is not something that a layperson would be expected to know without expert testimony. Russell offered no evidence concerning how the flight crew should have handled their suspicions that he smoked in the lavatory or how they failed to comply with that standard of care. Likewise, Russell admits that he disregarded instructions from the flight attendants to remain seated during the medical emergency. [*14] Consequently, Russell cannot prove that Wright Raffo and Vanderwiel were negligent.

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[10] *See* Lexington-Fayette Urban County Government v. Middleton, 555 S.W.2d 613, 617-18 (Ky.App. 1977); *See also* City of Lexington v. Gray, 499 S.W.2d 72, 74 (Ky. 1972).

[11] Yanero v. Davis, 65 S.W.3d 510, 522-23 (Ky. 2001).

[12] Perkins v. Hausladen, 828 S.W.2d 652, 654, 39 4 Ky. L. Summary 48 (Ky. 1992).

[13] Id. at 654-55; *citing* Prosser and Keeton on Torts, § 39, p. 256 (5th ed. 1984).

Similarly, Russell's claim of negligent infliction of emotional distress was properly dismissed. It is well established that an action will not lie for negligent infliction of emotional distress absent some showing of physical contact.[14] Russell does not allege that there was any physical contact between him and the Southwest flight attendants. And while there was physical contact between Russell and Officer Rhodes, we have already concluded that Officer Rhodes was not negligent.

Furthermore, "humiliation" is not a separate cause of action. Rather, humiliation is a form of emotional distress that flows from the torts of false arrest and negligent infliction of emotional distress.[15] Finally, in light of the dismissal of the underlying tort claims, Russell's claim for punitive damages was also properly dismissed.

Accordingly, the summary [*15] judgments granted by the Jefferson Circuit Court are affirmed.

ALL CONCUR.

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[14] *See* Capital Holding Corp. v. Bailey, 873 S.W.2d 187 (Ky. 1994); Mitchell v. Hadl, 816 S.W.2d 183, (Ky. 1991); and Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980).

[15] *See* Davis v. Graviss, 672 S.W.2d 928, 931 (Ky. 1984); and Banks v. Fritsch, 39 S.W.3d 474, 480 (Ky.App. 2001).